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In the Supreme Court of the United States

December Term, 1987

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA STATE POLICE and the COMMISSIONER OF THE PENNSYLVANIA STATE POLICE,

Petitioners

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and LIEUTENANT OTTO J. BINKER,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals establish a novel rule in age discrimination cases in holding that the Pennsylvania State Police (PSP) had not established a bona fide occupational qualification of good health and physical fitness when the PSP had not developed, implemented or enforced any minimum standards of health or fitness?

2. Is a District Court's finding of good health, physical fitness, strength and dexterity as BFOQ's, clearly erroneous when the finding is based upon the general truism that physical capabilities decrease with age, and no findings were made to establish what minimal levels of these traits are reasonably necessary to the essence of state police work, and the uncontradicted evidence of record establishes that state troopers are not required to maintain any minimum levels of fitness as a qualification for keeping their jobs?

TABLE OF CONTENTS

	PAGE
Counter-Statement of Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Statutory Provisions Involved	1
Counter-Statement of the Case	2
Reasons for Denying the Writ	6
1. The Third Circuit's Holding does not Establish a Novel Rule in Mandatory Retirement Cases under the ADEA	6
(a) The Third Circuit's Decision Does Not Require Mandatory Testing of All Employees to Establish a BFOQ	6
(b) The Third Circuit's Opinion is in Accord with the ADEA Which Requires That Cases Be Decided on an Individual Basis	8
2. The Decision by the Third Circuit does not Conflict with Decisions of Other Courts ...	9
3. The Third Circuit's Conclusion that the District Court Committed Clear Error in Finding that the PSP Demonstrated a BFOQ should not be the Basis for Granting Certiorari	10
(a) The PSP has Failed to Establish Why the District Court's Finding of a BFOQ Should be Reviewed	10
(b) The Circuit Court Correctly Concluded That the District Court Erred in Finding that the PSP Demonstrated a BFOQ ...	11
(c) The Circuit Court Opinion does not Require that Certiorari be Granted to	

Review the Entire BFOQ Defense 13
Conclusion 14

TABLE OF AUTHORITIES

CASES: PAGE
EEOC v. City of East Providence, 798 F.2d 524 (1st Cir. 1986) 9, 10
EEOC v. Commonwealth of Pennsylvania, Nos. 86-5807 and 86-5902 (3rd Cir. Sept. 21, 1987) 5, 7, 12
EEOC v. Commonwealth of Pennsylvania, 768 F.2d 514 (3rd Cir. 1985) 3
EEOC v. Commonwealth of Pennsylvania, 645 F. Supp. 1545 (M.D. Pa. 1986) 3
EEOC v. Commonwealth of Pennsylvania, 596 F. Supp. 1333 (M.D. Pa. 1984), *vacated and remanded*, 768 F.2d 514 (3rd Cir. 1985) 2, 4
EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 106 S. Ct. 888 (1985) 9
EEOC v. State of New Jersey, 620 F. Supp. 977 (D. C. N.J. 1985) 12, 13
EEOC v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1983) 9
Heiar v. Crawford County, Wisconsin, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) 8, 9
Johnson v. Mayor and City of Baltimore, 105 S. Ct. 2717 (1985) 3, 7, 12
Stone v. Western Air Lines, Inc., 544 F. Supp. 33 (C.D. Calif. 1982) 7

Trans World Airlines, Inc. v. Thurston, 105 S. Ct. 613 (1985) 7

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) 3

Western Airlines, Inc. v. Criswell, 105 S. Ct. 2743 (1985) 3, 5, 7, 8, 11, 12

STATUTES:

Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et. seq.* 2

29 U.S.C. 621 (b) 7

29 U.S.C. 623 (a) (1)..... 11

29 U.S.C. 623 (f) (1) 12

OTHER AUTHORITIES

Supreme Court Rule 21.1 (j) 11

Supreme Court Rule 21.3 11

Supreme Court Rule 21.5 11

STATUTORY PROVISIONS INVOLVED

The Respondent agrees with the PSP's references to applicable statutory provisions with the exception of the citation to: The Age Discrimination Employment Amendments of 1986, P.L. No. 99-592, §3(a), (b), 100 Stat. 3342 (codified at 29 U.S.C.A. §623(i) and note (West Supp. 1987).

These provisions become effective on January 1, 1987, and do not apply to any cause of action arising under the Age Discrimination in Employment Act of 1967 as in effect before January 1, 1987. *See* The Age Discrimination Employment Amendments of 1986, P.L. No. 99-592, 7, 100 Stat. 3344 (codified at 29 U.S.C.A. §623 note (West Supp. 1987). *See* PSP petition at p. 21 n. 11.

COUNTER-STATEMENT OF THE CASE

The Petition presented by the Pennsylvania State Police (PSP) asks this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit which held that Pennsylvania's mandatory retirement of state police officers at age 60 violated the provisions of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, (ADEA). Specifically, the Third Circuit held that since the PSP was attempting to retire 60 year olds based upon job fitness qualifications which it did not impose upon younger members of the force, the district court had committed clear error in finding that the PSP demonstrated a bona fide occupational qualification (BFOQ) justifying retirement of 60 year olds.

Lieutenant Otto J. Binker initiated this action on March 11, 1983 challenging his forced retirement from the PSP on his 60th birthday as, *inter alia*, a violation of the ADEA[1]. Although preliminary injunctive relief was granted by the District Court, Binker's request for a permanent injunction was denied on October 24, 1984, in *EEOC v. Commonwealth of Pennsylvania*, 596 F. Supp. 1333 (M.D. Pa. 1984). A timely appeal was filed with the Third Circuit and the District Court granted an injunction pending appeal. While on appeal, this Court

[1] On May 9, 1983, the EEOC initiated a similar action against the PSP which was subsequently consolidated with the Binker action by the U.S. District Court for the Middle District of Pennsylvania.

announced its decisions in *Johnson v. Mayor and City Council of Baltimore*, 105 S. Ct. 2717 (1985) and *Western Airlines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985), clarifying when age-related employment criteria are valid under the ADEA and adopting the two-pronged BFOQ test articulated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). The Third Circuit accordingly vacated the District Court order and remanded for aditional particularized fact finding in accord with *Johnson* and *Criswell*. *EEOC v. Commonwealth of Pennsylvania*, 768 F.2d 514 (3rd Cir. 1985). The District Court had *assumed* that good health and physical strength were job qualifications reasonably necessary to the essence of the PSP business without making any particularized fact finding to that effect. The Court of Appeals stated at that time that it found this omission particularly troubling in light of the allegation that the PSP made no attempt to monitor the health and/or the physical prowess of younger officers and permitted some to remain with serious disabilities. *Id.*

On September 20, 1985 the District Court dissolved all injunctions and Lieutenant Binker was mandatorily and involuntarily retired on October 16, 1985. After additional remand hearings, the District Court once again entered an opinion and order finding that good health, physical fitness, and strength and dexterity were qualifications reasonably necessary to the job of state police trooper, and accordingly upheld the mandatory retirement of officers at age 60. *EEOC v. Commonwealth of Pennsylvania*, 645 F. Supp. 1545 (M.D. Pa. 1986) (App. lla-36a).[2] In its decision the Court made numerous

[2] All references to "App. _____a" refer to the appendix annexed to the PSP Petition for a Writ of Certiorari.

findings regarding the tasks and skills performed and required of state troopers, *id*, at 1547-1549 (App. 15a-19a), and numerous other findings regarding health, which support the general proposition that as age increases ability to perform physical functions decreases. *Id.* at pgs. 1550-1552. (App. 22a-24a). The District Court, however, made no findings on what *minimum level* of good health and physical fitness were reasonably necessary to the job performance of a state police officer.[3]

Significantly, the District Court also found that as of 1982 the PSP had only begun to develop a health and fitness program for its members, that as of April 1986 only the research phase of the program had been completed and development started, that in the *future* the PSP will perform quarterly assessments of the physical fitness of its members, and that *eventually mandatory fitness standards will be implemented. Id.* at 1549. (App. 19a-20a). Additionally, while the District Court made findings that the PSP does pursue some limited monitoring of health and maintains limited duty status for those who cannot perform the full range of trooper duties, *id.* at 1549-1550, (App. 20a-21a), the District Court could not point to any evidence which showed that the PSP ever disciplined an officer for a poor physical condition or that any minimum fitness standards were required of any trooper.

[3] It is noteworthy that in October 1983, the PSP in defense of this action, tested officers of all ages under a test battery designed to determine if cadets could satisfy *minimum* physical requirements of a PSP trooper. The results of its testing revealed that not a single officer over 40 was capable of doing his job. The District Court did not find the test to be credible. *EEOC v. Commonwealth of Pennsylvania*, 596 F. Supp. at 346-347.

On appeal, the Third Circuit held that the District Court committed clear error in finding that the PSP demonstrated a bona fide occupational qualification justifying mandatory retirement at age 60. *EEOC v. Commonwealth of Pennsylvania*, Nos. 86-5807 and 86-5902. (3rd Cir. Sept. 21, 1987) (App. 1a-10a). The Court ruled that the District Court could not satisfy the first prong of the *Criswell* BFOQ test in that it did not determine what minimum level of fitness was reasonably necessary to the job of state police trooper. While the District Court made findings on the general tendency of health to decline with age, it did not define the level which was reasonably necessary to the job of state trooper. More importantly, however, the Third Circuit held that the PSP could not establish a bona fide job qualification based upon health and physical conditioning when the PSP admitted no mandatory minimum fitness standards existed and that such standards would only be implemented sometime in the future. In light of the ADEA's prohibition against selective age-based enforcement of health and fitness requirements, the Court of Appeals concluded that before the PSP could attempt to justify good health and fitness as BFOQ's, they must at least attempt to require these traits of all employees and not just those that it wishes to retire. It is from this holding that the PSP requests that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit.

REASONS FOR DENYING THE WRIT

1. THE THIRD CIRCUIT'S HOLDING DOES NOT ESTABLISH A NOVEL RULE IN MANDATORY RETIREMENT CASES UNDER THE ADEA

a. The Third Circuit Decision Does Not Require Mandatory Testing Of All Employees to Establish a BFOQ.

The principal reason and first question advanced by the PSP for the granting of a writ of certiorari is that the Third Circuit has somehow established a new rule in age-discrimination cases which not only requires employers to show that a particular job qualification is reasonably necessary to the essence of its business, but now also requires that an employer demonstrate that each individual employee possesses the job qualification. The PSP, however, has misapprehended the basis of the Circuit Court's opinion.

Through some contrivance of its own, the PSP has equated the Third Circuit's statement that "[u]ntil minimum standards are developed, implemented and enforced, the PSP cannot justify its mandatory retirement law by relying on good health and physical conditioning as BFOQ's reasonably necessary to PSP business," to mandate that it must conduct individual testing of all officers and sanction and/or dismiss all those that fall below the job qualification in order to establish good health and physical conditioning as a BFOQ. PSP petition at p. 12. The PSP has overreacted to what was a plain and straightforward application of the ADEA by the Circuit Court to the uncontradicted facts of this case.

The Third Circuit was not establishing a new BFOQ test outside that established by this Court in *Criswell* and *Johnson, supra*, but rather was in essence stating that the PSP could not justify retiring 60 year olds for not possessing exemplary physical health and fitness when the PSP made no attempt to require troopers to meet minimum fitness requirements, and, indeed, no fitness standards even existed. Thus, the Third Circuit was compelled to conclude that retiring 60 year olds under the pretext of lack of physical fitness would constitute selective age-based enforcement of health and fitness requirements in violation of the ADEA, (slip op. at 6-7, App. 6a-7a), which by its express terms prohibits arbitrary age discrimination in employment. 29 U.S.C. §621(b).

The Circuit Court's opinion no where states that the PSP must test every employee or dismiss every employee that fails to meet minimum fitness qualifications. The PSP has unnecessarily *presumed* these requirements from an incorrect reading of the Circuit Court opinion. The Circuit Court has only stated that where the PSP attempts to rely upon good health and physical conditioning as BFOQ's, there must be some minimum standards to establish that there *are in fact* job qualifications, and some enforcement of these standards to prevent arbitrary age discrimination by only applying these standards to the older members of the force. *See, EEOC v. Commonwealth of Pennsylvania*, slip op. at 7, *citing, Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613 (1985) (App. at 7a); *See also, Stone v. Western Airlines, Inc.*, 544 F. Supp. 33 (C.D. California 1982) (prima facia case of age discrimination may be established by showing discriminatory treatment). The PSP admits in its Petition at pages 10-11 that a trait can

only justify a mandatory retirement age if it is a trait an employer attempts to require of all employees and the employer does not discriminately apply higher standards to older employees. In light of this admission it is hard to imagine why the PSP has attempted to justify retiring Lieutenant Binker for failing to possess some yet undetermined level of fitness when it admits no minimum fitness standards exist to date.

b. The Third Circuit Opinion Is In Accord With The ADEA Which Requires That Cases Be Decided on An Individual Basis.

The PSP also argued that a writ should issue because the Third Circuit has now opened the new and important question of what evidence an employer must provide of its commitment to a bona fide job qualification to avoid violations of the ADEA. (*See* PSP petition at pgs. 11, 20). Contrary to the PSP's arguments, the Court of Appeals' decision does not break new ground concerning the quantum of proof required of an employer for cases under the ADEA. The PSP in effect are requesting that this Court formulate a quick panacea which would permit employers to plug routine criteria into a set formula to establish compliance with the ADEA. The plain and simple answer to the PSP contention is that it must present evidence sufficient to convince a fact-finder that it has established a valid BFOQ. This is in accord with Congress' intent that problems involving age discrimination in employment be resolved on a case-by-case basis. *Criswell.* And the mere fact that evidentiary records and results may differ is of no consequence under the ADEA, so long as those results are not clearly erroneous. *Heiar v. Crawford County, Wisconsin*, 746 F. 2d. 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

The Third Circuit did not alter the measure of proof required by the PSP or any other Defendant. The Third Circuit simply concluded that the District Court, sitting as a fact-finder, could not conclude as a matter of law that the PSP demonstrated a valid BFOQ based upon good health and physical conditioning when the uncontradicted facts of record established that the PSP had *no* minimum fitness standards and sought to involuntarily retire its older members under fitness criteria it did not require of any other employees. Had the proof been different during the trial of this action, the PSP might have enjoyed a different result. The PSP may solve their present violations of the ADEA in any number of ways, which when submitted to a fact-finder, may produce favorable results. But this Court cannot give defendants a quick solution for all cases under the ADEA thereby depriving the fact-finder of its duty and obligation to consider all the evidence in a case. Accordingly, it is improper to ask this Court to grant certiorari to formulate a quick fix solution for defendants under the ADEA.

2. THE DECISION BY THE THIRD CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS

The PSP cites the cases of *E.E.O.C. v. City of East Providence*, 798 F.2d 524 (1st Cir. 1986), *E.E.O.C. v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 106 S. Ct. 888 (1985), *E.E.O.C. v. University of Texas Health Science Center at San Antonio*, 710 F.2d 1091 (5th Cir. 1983), and *Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985), for the proposition that a defendant's failure to periodically test officers below the age of 60 to determine whether they

meet minimum physical qualifications does not preclude a BFOQ defense to age discrimination. The PSP contends that the Third Circuit's opinion is in conflict with these cases because it allegedly requires employers to test *all* employees to establish a BFOQ defense. This argument should once again be summarily dismissed, as previously discussed in section 1(a) *supra*, since this argument misses the mark. The Court of Appeals established no such rule as a prerequisite to a BFOQ defense.

To the extent the Third Circuit disagreed with the Court in *East Providence*, its statements were only designed to address the arbitrary age-based enforcement of a BFOQ which is prohibited under the ADEA. Certainly, *East Providence* cannot be read to permit arbitrary age-based discrimination. Moreover, the cases cited by the PSP are factually distinguishable upon the basis that none of them presented a situation where the employer admitted it had no minimum fitness standards, yet was attempting to retire its older members based upon fitness requirements. In this respect, the present case stands alone and demonstrates a clear case of arbitrary age-based discrimination, which is not in conflict with the cases cited by the PSP.

3. THE THIRD CIRCUIT'S CONCLUSION THAT THE DISTRICT COURT COMMITTED CLEAR ERROR IN FINDING THAT THE PSP DEMONSTRATED A BFOQ SHOULD NOT BE THE BASIS FOR GRANTING CERTIORARI

(a) The PSP Has Failed To Establish Any Reasons Why the District Court's Finding of a BFOQ Should be Reviewed.

Although the PSP have presented two questions for review in its Petition for a Writ of Certiorari, the content

of its petition only addresses and argues for certiorari on the first; that being whether the Court of Appeals established a rule in ADEA cases requiring an employer to enforce minimum standards of fitness against *all* employees before it can establish a BFOQ defense. The second question seeks review of the District Court's entire findings on the BFOQ defense. Since the reasons for seeking certiorari on this second general question do not appear in the PSP Petition, it should be deemed abandoned under Supreme Court Rules 21.1(j), 21.3, and 21.5 which require that a petitioner set forth all contentions in support of a petition for a writ of certiorari in clear and concise terms in the body of the petition. Accordingly, the Respondent requests that consideration for certiorari be limited only to the first question presented by the PSP, and that certiorari be denied on that question as well.

(b) The Circuit Court Correctly Concluded That the District Court Erred in Finding That the PSP Demonstrated a BFOQ.

Consideration of the PSP's second question for review still does not warrant the granting of a writ of certiorari.

The ADEA makes it, *inter alia*, unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his employment because of the individual's age. 29 U.S.C. §623(a)(1). Age, however, sometimes must serve as a necessary proxy for neutral employment qualifications essential to an employer's business, *Criswell*, and therefore the ADEA provides a very *narrow exception* to the general prohibition against age discrimination where "age is a bona fide

occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. §623(f)(1). In *Criswell*, this Court adopted a two-prong test to determine when age-related employment criteria could be used as a proxy for a BFOQ. Under *Criswell*, an employer must first show that a job qualification which he invokes to justify age discrimination must be "reasonably necessary" to the essence of his business, and second, that the employer is compelled to rely upon age as a proxy for the job qualification validated in the first inquiry. *Id.* The relevant criteria for determining the second prong of this test were not disputed by the parties. The District Court's finding under the first prong, however, was the subject of the Third Circuit's review.

The standard employed under the first prong is one of "reasonable necessity" not just "reasonableness." *Criswell*, and *E.E.O.C. v. State of New Jersey, 620 F. Supp. 977 (D. N.J. 1985).* An employer attempting to establish a qualification "reasonably necessary" to its business is required to present a *particularized factual showing* with respect to each element of the BFOQ defense. *Id., citing Johnson* and *Criswell.* An employer therefore may not rely solely upon the truism that physical fitness declines with age. *Id.* He must show that the age limit is based on "actual occupational qualifications." *Johnson*, 105 S. Ct. at 2724.

In the present case, while the District Court found that good health, physical fitness, strength and dexterity were qualifications reasonably necessary to the essence of PSP business, it did not indicate what level or minimum level of these traits were necessary to the performance of a state police trooper's occupation. *E.E.O.C. v. Commonwealth of Pennsylvania, slip op.* at 7, (App. 7a). This omission precluded a finding of a

BFOQ. Even when the essence of an employer's business is safety, "the reasonable necessity of employing only individuals in top physical condition may not be presumed." *State of New Jersey*, 620 F. Supp. at 982.

Certiorari on this issue should not be granted since the PSP admits that an employer should "provide sufficient evidence to justify the finding of a reasonably necessary job qualification" by introducing "some evidence of its commitment to these qualifications." PSP petition at p. 19. The PSP also acknowledges that a plaintiff could "counter this presentation . . . with evidence that the employer's actual practice belies its claim of reasonable necessity." *Id.* What is most significant, however, is the PSP's admission that it has no minimum fitness standards. The absence of any fitness standards by definition belies the contention that the PSP can rely upon fitness as "reasonably necessary" to the essence of its business to establish a BFOQ defense under the ADEA. While the general proposition—that good health is a qualification desirable for the job of state trooper—may pass muster under a "reasonable" test, "reasonable necessity" requires more. The District Court clearly erred when it did not determine what level of physical fitness was reasonably necessary to the job of a Pennsylvania state trooper.

(c) The Circuit Court Opinion Does Not Require that Certiorari Be Granted To Review the Entire BFOQ Defense.

The Third Circuit properly concluded that the PSP had violated the ADEA by attempting to retire officers through selective age-based enforcement of fitness requirements which it did not require of any members of its force and when it had no minimum fitness standards

as a qualification for troopers keeping their jobs. This type of arbitrary discrimination is in and of itself prohibited by the ADEA, (*see* section 1(a) *supra*), and this Court therefore need not address the second question presented by the PSP in its petition.

CONCLUSION

For all the foregoing reasons, the Respondent, Lieutenant Otto J. Binker, by and through his attorneys, respectfully requests that this Court deny the Pennsylvania State Police Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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